IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-893

SADIE GERTLER, WIFE OF/AND DAVID GERTLER,
Petitioners,

versus

CITY OF NEW ORLEANS, DEPARTMENT OF SAFETY AND PERMITS OF THE CITY OF NEW ORLEANS, BOARD OF ZONING ADJUSTMENTS AND MILES J. KEHOE,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

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TABLE OF CONTENTS

TABLE OF CONTENTS (Continued)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (Continued)

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Petitioners respectfully pray that a writ of certiorari be granted to review the action of the Supreme Court of Louisiana on September 23, 1977, denying writs of certiorari to the Louisiana Court of Appeals which reversed the court of original jurisdiction in a case entitled *Sadie Gertler, wife of/and David Gertler versus City of New Orleans, Dep't of Safety and Permits of the City of New Orleans, Board of Zoning Adjustments and Miles J. Kehoe.*

OPINION BELOW

No reported opinion of the Civil District Court, Parish of Orleans, State of Louisiana, was issued; a copy of the Court's opinion of June 6, 1975, is reprinted in the Appendix at 21a. The opinion of the Court of Appeals, Fourth Circuit, State of Louisiana, is reported at 346 So. 2d 228 (1977), and is reprinted in the appendix to this petition at 32a. The denial of the petition for want of certiorari to the Supreme Court of Louisiana is reported at 349 So. 2d 885 (1977), and is reprinted in the appendix to this petition at 44a.

JURISDICTION

The memorandum opinion of the Supreme Court of Louisiana was filed on September 23, 1977. This petition is filed within the time allowed for the filing of such petition.

The jurisdiction of this Court is invoked under 28 *U.S.C.* § 1257(3).

QUESTION PRESENTED

This case presents constitutional issues concerning the right of a person to equal protection and due process when seeking court review of an action of an administrative body, specifically a city Board of Zoning Adjustments. The relevant circumstances in the instant case require a determination as to whether a presumption of correctness should be afforded to the decision of the board which is based on an administrative hearing that is devoid of procedural due process and fundamental fairness.

This case presents the following question with respect to this issue:

1. Petitioners were deprived of valuable property rights without equal protection and due process of law when the appellate court required them to overcome the presumption of correctness afforded an administrative decision when that decision was based on a hearing that afforded no due process safeguards or fundamental fairness, contrary to the findings of a court after a trial de novo.

STATUTORY PROVISIONS INVOLVED

This case presents issues arising under the fourteenth amendment to the United States Constitution, which provides in pertinent part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

STATEMENT OF THE CASE

On June 7, 1974 Mrs. Sadie Gertler purchased the premises located at 605-607 Harrison Avenue from the original owners Dr. and Mrs. Armand Suarez. The portion of the property that faces Harrison Avenue had been used by Dr. Suarez as a dental office which constituted a nonconforming, sanctioned use under the 1970 Comprehensive Zoning Ordinance of the City of New Orleans, Article 12. Mrs. Gertler desired to continue the nonconforming commercial nature of the property by using the property as a small ladies dress

shop. A use and occupancy certificate #6302 was obtained on May 29, 1974 from the City of New Orleans, Office of Safety and Permits. Also, upon submission of plans and specifications to the same office showing that no structural changes would be made, Mrs. Gertler obtained a building permit #B-06804. Thereafter, work was begun and continued until approximately September 6, 1974 when Miles J. Kehoe appealed the Director of Safety and Permits' decision to the Board of Zoning Adjustments of the City of New Orleans.

A hearing was held before the Board which was composed of political appointees on September 19, 1974. The hearing consisted solely of unsworn statements by several neighbors of the Petitioners, and a statement by the Petitioners. Only the members of the Board were able to question the participants, with no right of cross-examination or subpoena being afforded to the parties. On September 24, 1974 a resolution was adopted reversing the decision of the Director of Safety and Permits, and the building permit was revoked.

Pursuant to *LSA-R.S.* 33:4727 (1966), Petitioners filed a petition for writ of certiorari to the Civil District Court for the Parish of Orleans. The District Court ordered a trial de novo, which afforded the parties a right to subpoena and to cross-examine witnesses, and to introduce the evidence heard at the Board's hearing as well as any additional evidence. The court thoroughly reviewed and weighed the evidence, and pointed out inconsistencies between testimony given at the Board hearing and at the trial. (Appendix 21a). Based upon all the evidence, on June 6, 1975, the Civil District Court rendered its decision

reversing the Board of Zoning Adjustments and reinstated the Petitioner's building permit.

Respondents appealed to the Louisiana Fourth Circuit Court of Appeals. On April 13, 1977, that Court reversed the Civil District Court and reinstated the resolution adopted by the Board of Zoning Adjustments. The Court's opinion stated that a court reviewing a Board of Zoning Adjustment must give the action of that board a presumption of correctness, no matter how informal the hearing given by the Board, and despite the fact that the court heard the case de novo. Petitioners' application for a rehearing was denied on June 7, 1977.

Petitioners' application for a writ of certiorari to the Supreme Court of Louisiana was denied on September 23, 1977.

Petitioners contend that being required to overcome a presumption of correctness given to a hearing which was totally devoid of procedural due process, is an unconstitutional burden and a deprivation of property without due process.

REASONS FOR GRANTING THE WRIT

1. **Petitioners were deprived of valuable property rights without equal protection and due process of law when the appellate court required them to overcome the presumption of correctness afforded an administrative decision when that decision was based on a hearing that afforded**

no due process safeguards or fundamental fairness, contrary to the findings of a court after a trial de novo.

This case deals with the right to a fair hearing when a property right is taken from a party, and the ramifications of a denial of such a hearing. Petitioners contend that they have a nonconforming use in their building which the City of New Orleans has taken by revoking a permit to use the building in a nonconforming manner. The law is clear that "the right to nonforming use is a property right . . . a vested right . . . entitled to constitutional protection." E. Yokley, *Zoning Law and Practice*, § 16-3 at 219 (3d ed. 1965).

After the Petitioners had begun their nonconforming use, which was authorized by the appropriate officials, an appeal was made to the Board of Zoning Adjustments of the City of New Orleans by local property owners in order to deny Petitioners this use. A hearing, at which Petitioners were not allowed to subpoena or cross-examine witnesses, and at which the witnesses were unsworn, resulted in a revocation of Petitioners' permit.

As a leading authority on the law of zoning has stated, "(z)oning boards of review are administrative bodies which, when acting in their quasi-judicial capacity, must so act on the basis of facts lawfully ascertained." E. Yokley, *Zoning Law and Practice* § 13-9 at 96 (3d ed. 1965). All actions that are appealed to a zoning board, or Board of Zoning Adjustments as it is denominated in Louisiana, are handled by the board in a quasi-judicial capacity. *Id.* at 98.

The regulations of the Board of Zoning Adjustments of the City of New Orleans grant the parties to an appeal from the granting of a permit the right to a hearing. As this Court has said, when a hearing is required by an administrative agency, that hearing must at least comply with the minimal requirements of due process. *Wong Yang Sung v. McGrath*, 339 U.S. 33, *modified*, 339 U.S. 908 (1950). This rule has been followed in hearings given by zoning boards. *See, e.g., Yokley, supra* at 96, and cases cited, where it is stated:

> While zoning boards are not required to strictly observe the rules of evidence, and while in the conduct of hearings strict formality is not required, nevertheless, boards are not without some restraint in the conduct of hearings and they may not so conduct them as to deprive parties thereto of a fair and impartial hearing.

See also, Withrow v. Larkin, 421 U.S. 35, 46-47 (1975), where this Court held:

> [A] "fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 135 (1955). This applies to administrative agencies that adjudicate as well as to courts. *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973).

It is clear that a fair hearing was not granted in the present case. One of the most basic elements of a fair hearing would seem to be the right to test the evidence, especially when the proponent is not under oath. As this Court noted in *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970):

> In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses. *E. g., ICC v. Louisville & N. R. Co.*, 227 U. S. 88, 93-94 (1913); *Willner v. Committee on Character & Fitness*, 373 U. S. 96, 103-104 (1963).

The hearing granted in the present case, however, was little more than a shouting match, with no cross-examination, no witnesses under oath, no right to subpoena witnesses, and no attempt to make a systematic and accurate determination of the truth.

However, Petitioners' quarrel is not with the process given at the hearing before the Board, because the legislature has provided for a de novo review to cure the deficiencies. *LSA-R.S.* 33:4727 (1966). Rather, it is respectfully submitted that when a court hearing a case de novo is required to afford a presumption of correctness to an administrative decision which is devoid of due process and fundamental fairness, any attempt by the legislature to correct or mitigate by judicial review the procedural and substantive deficiencies inherent in the administrative hearing are nullified by requiring a showing of arbitrariness or that the administrative decision was manifestly erroneous. In the instant case, the constitutional deprivations are well illustrated. The Board of Zoning Adjustment is comprised of political appointees who hear appeals regarding permits. At these hearings, the witnesses are not sworn, nor may counsel cross-examine them or subpoena other witnesses. In this atmosphere of opinion, emotion, and private interests, the opportunity for disparate treatment of similarly

situated persons is great, and is directly affected by the pressures brought to bear on the members of the Board by the opposing parties. The Board, relying on its presumption of correctness, need only generate a colorable argument for its decision since it alone controls the scope of the inquiry at the hearing.

This court stated as long ago as 1939 that when an order of an administrative agency, in that case the Interstate Commerce Commission, is reviewed by a court, "the basic prerequisites of proof" needed to be satisfied to enable the court to uphold the order. *Rochester Telephone Corporation v. United States*, 307 U.S. 125, 140 (1939). Later courts have noted that,

> the "substantial evidence" test itself is closely related to the due process concept. An administrative ruling not reasonably supported by the proofs is, hence, violative of due process because of its inherently arbitrary character.

Sterling Davis Dairy v. Freeman, 253 F. Supp. 80, 82 (D.N.J. 1965). *Accord, OKC Corporation v. Oskey Gasoline & Oil Co.*, 381 F. Supp. 865, 869 (N.D. Tex. 1974); *Lechich v. Rinaldi*, 246 F. Supp. 675, 684 (D.N.J. 1965).

This need for due process in an agency before a court will give the agency's action a presumption of correctness has been recognized explicitly by at least one court, and implicitly by several others. In *O'Neil v. Pallot*, 257 So. 2d 59 (Fla. App. 1972), the court reviewed an administrative decision based on a hearing that lacked procedural due process. It framed the issue as whether or not it should grant a presumption of cor-

rectness to the agency's action. The court rejected the notion of granting a presumption, holding:

> It is only after an administrative hearing with all of the procedural safeguards has been had that a presumption of correctness can be indulged in by the courts as to any administrative action which is quasi-judicial in character.

Id. at 61.

This Court is among those federal courts that have implicitly recognized that the denial of a fair hearing can only be cured by a de novo judicial review or trial. Thus, in *Ewing v. Mytinger & Casselberry*, 339 U.S. 594, 598 (1950), this Court noted:

> We have repeatedly held that no hearing at the preliminary stage is required by due process so long as the requisite hearing is held before the final administrative order becomes effective. See Lichter v. United States, 334 U.S. 742, 68 S.Ct. 1294, 92 L.Ed. 1694; Inland Empire Council v. Millis, 325 U.S. 697, 65 S.Ct. 1316, 89 L.Ed. 1877; Opp Cotton Mills v. Administrator of Wage & Hour Division of Dept. of Labor, 312 U.S. 126, 61 S.Ct. 524, 85 L.Ed. 624.

See Von Clemm v. Smith, 204 F. Supp. 110 (S.D.N.Y. 1962), where the court, after citing the above mentioned cases and others, states:

> These cases, in effect, hold that where there is an absence of an administrative hearing,

> there is no denial of due process where either a *de novo* judicial review or trial is available before the Government's action becomes final.

Id. at 112, n. 1.

In *McCabe v. Board of Trustees of Police Pension Fund of City of New York, Article 2*, 56 Misc. 2d 329, 288 N.Y.S.2d 538 (1968), the medical board of the police pension fund had not allowed the petitioner to be heard at a hearing that was required to be held. After quoting *Opp Cotton Mills, supra*, to the effect that a hearing may be given at any stage of a proceeding, the court held:

> Nor is the requirement of a hearing satisfied by the opportunity to seek court review, in an Article 78 CPLR proceeding where the scope of review is not *de novo, and the presumptions operate heavily in favor of upholding the determination.*

288 N.Y.S.2d at 540 (emphasis added). In *United States v. Maxwell*, 278 F.2d 206 (8th Cir. 1960), the District Court was called upon to review a state committee's termination of acreage and conservation reserve agreements granted under the Soil Bank Act, 7 *U.S.C.* § 1801 *et seq.* (1950). The court stated:

> Section 1831(d) provides for a trial de novo in the district court. Such provision negatives any thought that the trial court is bound to give any presumptive force to the findings of the State Committee. The responsibility for

> determining disputed fact issues is placed squarely upon the trial court. The record shows that the evidence before the court is more extensive and differs in a number of material respects from the record made before the Committee.

Id. at 209. The District Court's reversal of the state committee was upheld. In the present case, as in *Maxwell*, the evidence at the de novo review differed in a number of material respects from the evidence presented to the Board.

The United States Congress has also recognized that de novo review is required to correct agency action which lacks procedural due process. As this Court noted in *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971), when discussing 5 *U.S.C.* § 706(2)(F) (1964 ed. Supp. V), "*de novo* review is authorized when the action is adjudicatory in nature and the agency factfinding procedures are inadequate."

The opinion of the Court of Appeals for the Fourth Circuit, State of Louisiana, on which Writs of Certiorari were denied by the Supreme Court of Louisiana, does not follow the correct constitutional standard set out above. The Court held that a district court "must, generally, accord a presumption of regularity to the decisions of boards of adjustment", 346 So. 2d at 233, whether the court exercised de novo review or not. No mention is made in the Court of Appeals' opinion of the need for due process in the agency action before this presumption of correctness can be given. In fact,

the Court of Appeals states that the only action a district court may take is to see "whether or not the Board of Zoning Adjustments was arbitrary and capricious in making [a] factual determination", *id.* at 234, despite the fact that the District Court was hearing the case de novo, and the Board had not provided any due process safeguards in its hearing. Thus, the Court of Appeals allows Petitioners to be deprived of their legal right to property without any chance to present the legal and factual issues to a tribunal in a manner in accord with due process. This latter point is crucial in that zoning decisions in general, and decisions as to the cessation or expansion of nonconforming uses in particular, present mixed questions of law and fact. In the instant case, the facts surrounding cessation and expansion were in conflict, and the Court of Appeals acknowledged that it could find no manifest error in the findings of the board or the trial court. The court then allowed the presumption to prevail without recognizing that the trial court had carefully examined the law concerning cessation and expansion of nonconforming uses, and had applied the law to the facts. It is respectfully submitted that there can be no presumption of correctness afforded to a board on questions of law. In the context of this case, the procedural due process deficiencies of the Board hearing are exacerbated by a presumption of correctness which was applied to both the factual and the legal questions of the case. By applying the presumption broadly, without a careful analysis of the nature of the hearing process and the findings of the trial court, the Court of Appeals has placed upon Petitioners an insurmountable appellate burden.

While this Court will not concern itself with cases which present no substantial federal question, it is respectfully submitted that the state courts throughout the country need to have the parameters of due process in the context of administrative hearings and the scope of review thereof clearly delineated (as this Court did in Overton Park). This is necessary in order to prevent the disparate treatment of similarly situated persons from generating a lack of confidence and respect for the law, and is particularly important where valuable property rights are involved.

CONCLUSION

Petitioners respectfully submits that the effect of a hearing de novo, recognized as so important in the correction of procedural deficiencies, is vitiated when a presumption of correctness is given to the faulty hearing below. Petitioners therefore urge this court to hold that when an agency fails to provide a required fair hearing, that failure cannot be corrected by a de novo review that must award a presumption of correctness to the agency action, and that the granting of this presumption denies the Petitioners their right to equal protection and due process when their property is taken.

Respectfully submitted,

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APPENDIX

CITY OF NEW ORLEANS
DEPARTMENT OF SAFETY & PERMITS
Board of Zoning Adjustments
Room 7E-05 City Hall
New Orleans, La. 70112

September 27, 1974

NOTICE OF DISPOSITION OF ZONING CASE

This will advise that under date of September 24, 1974 the Board of Zoning Adjustments UPHELD your Application for an Appeal from the Decision of the Director in issuing Permit No. B06804

There is attached hereto for your information and guidance copy of the resolution adopted by this Board in connection with this Docket.

Respectfully,
BOARD OF ZONING
ADJUSTMENTS
/s/ CALVIN J. FERRAN
Calvin J. Ferran,
Chairman

CC Mr. Edward C. Kurtz
DIRECTOR
Department of Safety and Permits

CITY OF NEW ORLEANS
DEPARTMENT OF SAFETY AND PERMITS

BOARD OF ZONING ADJUSTMENTS

7E05 City Hall — Civic Center
New Orleans, La. 70112

RESOLUTION

adopted by the Board of Zoning Adjustments at a meeting held September 24, 1974 — Re: Docket 182-74-6301 Louis XIV St., RD-2 Two Family Residential District.

Whereas, Emile J. Dreuil attorney for Miles J. Kehoe filed an Appeal from the Decision of the Director of Safety and Permits for issuing building permit no. B06804 on the premises 6301 Louis XIV St., Sadie Gertler owner of property; and

Whereas, a public hearing was held September 19, 1974 after due notice at which protest to issuing permit was heard from many interested property owners; and

Whereas, the Board heard representative of applicant state the building's cubical content was being added to, as well as exterior looks and materials were being changed. A former rear yard, he said has been paved and will have off-street parking on Harrison St., also changing appearance of non-conforming building; and

Whereas, the members also took into consideration owners testimony, that she had bought in good faith a non-conforming building, and was not structually changing it; and

Whereas, the Board members felt that an on the scene inspection was necessary to see for themselves and fully understand the case. After said inspection the members discussed scene and reviewed file; and

Whereas, it was noted that application for Use and Occupancy Permit on file in Safety and Permits Office states office space to be used will not exceed 702 sq. ft. This would be the space occupied by previous owner for dentist office. The members saw that the actual space to be used for dress shop exceeds this 702 sq. ft., incorporating a former apartment. Therefore, the cubical content is being added to. The exterior, it is felt by the members has been altered enough to change the appearance of the area and does in their opinion adversely effect the neighborhood. By paving a former rear yard area in this RD-2 Two Family Residential District the Board feels a Commercial appearance will replace a residential look. They are of the opinion that it would not be in keeping with the intent and purpose of the Ordinance to allow this business as cubical content and exterior appearance have been altered in this non-conforming building; and

Whereas, this change in USE is from a more restrictive use namely, a dentist office, to a less restrictive use, a commercial dress shop, also contrary to the Zoning Ordinance; and

Whereas, the Board also considered the overwhelming testimony of so many neighbors as to 6301 Louis XIV losing its non-conforming status, since the dentist has been incapacitated for over six months; and

Therefore, the Board of Zoning Adjustments upholds the APPEAL of Miles J. Kehoe against the Decision of the Director of Safety and Permits in issuing a building permit. The Board directs the Director, Edward C. Kurtz to revoke Use and Occupancy permit no. 6302.

VOTE TO UPHOLD APPEAL AND REVOKE UOA PERMIT

AFFIRMATIVE: CALVIN J. FERRAN
CLAUDE J. KELLY
C.E. SIMMONS
REV. R.H. TUCKER
ABSENT: MANFREY BUTLER
NEGATIVE: 0

APPROVED
BOARD OF ZONING
ADJUSTMENTS
/s/ CALVIN J. FERRAN
CALVIN J. FERRAN,
CHAIRMAN

PETITION FOR WRIT OF CERTIORARI AND REVIEW BY SADIE GERTLER, WIFE OF/AND DAVID GERTLER

Filed: Oct. 25, 1974

CIVIL DISTRICT COURT FOR THE
PARISH OF ORLEANS
STATE OF LOUISIANA

NO: 581-784 DIVISION "F" DOCKET

SADIE GERTLER, wife of/and
DAVID GERTLER

versus

CITY OF NEW ORLEANS, DEPARTMENT OF SAFETY AND PERMITS OF THE CITY OF NEW ORLEANS, BOARD OF ZONING ADJUSTMENTS AND MILES J. KEHOE

The petition of SADIE GERTLER, wife of/and DAVID GERTLER, persons of the full age of majority and domiciled in the Parish of Orleans, State of Louisiana, respectfully represent:

A. STATEMENT OF THE CASE

I.

In July 29, 1974, DAVID GERTLER filed, on behalf of SADIE GERTLER, his wife, an application for non-

structural repairs and alterations on the property located at 605 Harrison Avenue and also fronting on 6301 Louis XIV Street in the City of New Orleans. On that date the Department of Safety and Permits issued Building Permit No. 6804 authorizing said repairs and alterations.

II.

On September 6, 1974, MILES J. KEHOE, a neighbor located at 6317 Louis XIV Street, filed an appeal from the decision of the Department of Safety and Permits relative to issuing Building Permit No. 6804.

III.

A public hearing was held on September 19, 1974, at which your petitioner appeared.

IV.

On September 24, 1974, at a meeting of the Board of Zoning Adjustments, a resolution was adopted upholding the appeal of MILES J. KEHOE against the decision of the Director of Safety and Permits in issuing a building permit.

V.

Your petitioner, SADIE GERTLER, is owner of the property located at 605 Harrison Avenue fronting also on 6301 Louis XIV Street, lots Nos. 25 and 26 in Square No. 231 by virtue of an Act of Sale dated June 7, 1974, being the same property previously owned by Dr. and Mrs. Armand R. Suarez.

VI.

The property as fronting on 605 Harrison Avenue originally purchased by Dr. and Mrs. Suarez on November 7, 1946, was structurally altered and additional rooms were constructed to provide space for dentist and commercial offices on or about January, 1959. This area was used by Dr. Suarez as a dental office and other rental commercial offices without interruption from 1959 to date of purchase by SADIE GERTLER on June 7, 1974.

VII.

The area including Square No. 231 is zoned by the City of New Orleans as RD-2, Two Family Residential District. However, this property was advertised and sold to Mrs. Gertler as commercial by benefit of its non-conforming use as a dentist office and other commercial offices over the preceeding twenty-five years. Under the Comprehensive Zoning Ordinance, No. 4264 M.C.S., Article 12, Section 4, the change of ownership or the change of commercial use would not alter the non-conforming status of the property.

VIII.

Your petitioner is aggrieved by the decision of the Board of Zoning Adjustments and by the Petition of Certiorari and Review requests this court to sit in appellate review of the record to be made up by the Board of Zoning Adjustments in connection with a hearing herein, pursuant to the provisions of the Comprehensive Zoning Ordinance. Defendants are the City of New Orleans through the Honorable Moon

Landrieu, its Mayor, the Department of Safety and Permits of the City of New Orleans, through Edward C. Kuntz, its Director, the Board of Zoning Adjustments, through Calvin J. Ferran, its Chairman and Claude J. Kelly, C. E. Simmons, Rev. R. H. Tucker and Manfrey Butler, its members, and Miles J. Kehoe.

B. ISSUES

The issues presented by this Petition for Certiorari and Review are:

1) Whether the Board of Zoning Adjustments exceeded and violated its authority delegated under the Comprehensive Zoning Ordinance, specifically, Article 13, Section 3, Article 13, Section 12 which rendered their decision absolutely void.

2) Whether the decision of the Board of Zoning Adjustments was arbitrary, capricious and an abuse of discretion under the Comprehensive Zoning Ordinance, specifically, Article 12, Sections 2, 4, 5, and 7.

3) Whether the decision of the Board of Zoning Adjustments was erroneous in its conclusions of fact and law.

C. STATEMENT OF LAW

Petitioner, SADIE GERTLER, purchased the property located at 605 Harrison Avenue, corner 6301 Louis XIV on June 7, 1974. The portion of the property facing Harrison Avenue was being used as a dentist office by the then owner, Dr. Armand Suarez. There

was a sign on the lawn denoting a dentist office, the door was open for business and there was a receptionist taking information for the Doctor. The property was being advertised and offered as commercial under the status of non-conforming use, as evidenced by the Affidavit of Dr. and Mrs. Suarez, a copy of which is attached to this petition. Under these circumstances Mrs. Gertler purchased the property with the intent of changing the original non-conforming use to a ladies clothing store. In fact, a condition of the purchase agreement entered into between Mrs. Gertler and the Suarez's was that the "Sale is conditional upon the area of this property which faces Harrison Avenue is non-conforming, zoned commercial and that purchaser can operate a ladies' ready-to-wear and boutique at this location."

Shortly after the sale, petitioner went to the office of Safety and Permits for a Building Permit to do minor repairs. That office issued a Building Permit No. 6804 and pursuant thereto, the property was painted, cleaned and repaired (all of a non-structural nature). Upon completion, petitioner was advised of a Notice of Appeal from the issuance of this Building Permit No. 6804 by a resident at 6317 Louis XIV Street, Miles J. Kehoe. This appeal did not specify the grounds in accordance with Article 13, Section 4 of the Comprehensive Zoning Ordinance 4264 M.C.S., as amended, 1970, but did state a reference to the zoning classification, "RD-2". The appeal was heard before the Board of Zoning Adjustments and a decision was rendered on September 24, 1974, upholding the appeal.

Petitioner submits that this decision was ipso facto void because the Board of Zoning Adjustments did not

comply with the basic requirements of the Comprehensive Zoning Ordinance.

Article 13, Section 3, states:

> "Standards and Reasons for Decisions: . . . where an appeal is approved, the decision *shall* include a reference to the specific section or sections of this Ordinance under which such action is taken." (emphasis added)

Article 14, Section 1 on General Rules of Construction states that the word *shall* is always mandatory. A perusal of the decision of the Board in this case shows that not one section of the Ordinance was cited in support of its decision. The lack of such mandatory reference to the Ordinance leaves no alternative conclusion than that the decision was arbitrary and capricious and absolutely null.

The Board of Zoning Adjustments also exceeded its authority by rendering a decision which went beyond the basis of the appeal itself. The Notice of Appeal of Miles J. Kehoe clearly stated that it was an appeal exclusively from the building Permit No. 6804. Yet in its decision, the Board directed the Director of Safety and Permits to revoke the Use and Occupancy Permit No. 6302. This Permit was never mentioned in the appeal and no authority was stated by the Board for revoking same. In fact, Permit No. 6302 was issued to the prior owners, Dr. and Mrs. Suarez, neither of whom were notified of the appeal or parties at the hearing required by Article 13, Section 7, Comprehensive Zoning Ordinance. The only reasonable conclusion is that

the Board by revoking permit no. 6302 exceeded its authority and acted in an arbitrary and capricious manner.

Furthermore, the decision of the Board of Zoning Adjustments imposed a penalty which was also in excess of its authority. Assuming the decision on the merits was correct, which is strenuously denied, the penalty should have extended no further than a limitation on Mrs. Gertler's use of the property, not a revocation of the building permit. The findings of Board clearly established that the previous owner used 702 square feet for non-conforming office space. Even if the Board finds that present use of this property constitutes an improper extention of previously existing non-conforming uses, this does not work a loss of the then existing non-conforming uses. See: 101 C.J.S., page 952, Sec. 191. By attempting to impose a loss of the entire non-conforming use of this property, the Board acted arbitrarily and capriciously and its decision should be reversed.

Should, however, this honorable court find that these illegal acts of the Board do not constitute an absolute nullity of their decision, then and only in the alternative, petitioner submits that the decision itself was erroneous both as to the facts and law.

The decision noted certain facts which are clearly incorrect. First, the Board stated:

> "The members saw that the actual space to be used for dress shop exceeds this 702 square feet incorporating a former apartment."

The fact is that when the Board members inspected this property, it was not then in use. Mrs. Gertler had only begun necessary repairs and improvements and had not begun operating her dress shop. The relevant question before this Board was not what could or may be used for a dress shop, but what is actually being used. How could the Board make this determination without relying on Mrs. Gertler's testimony or seeing the shop in operation? It was obviously an arbitrary and capricious finding of fact.

Secondly, the Board stated, in its decision, regarding the facts, that:

> "The exterior, it is felt by the members, has been altered enough to change the appearance of the area and does in their opinion adversely affect the neighborhood."

To the contrary, the fact is that the only change in the exterior of the building was a vast improvement. Certainly, there is no restriction in the Comprehensive Zoning Ordinance from repairing or improving the property. Specifically, Article 12, Section 4, states:

> "If no structural alterations are made, a non-conforming use of a building may be changed to another non-conforming use of the same or more restricted classification."

Therefore, the only restriction is on structural change. Article 14, Section 105, defines structural changes as,

> "Any changes in the supporting members of a building, such as footings, bearing walls or partitions, columns, beams, or girders, or any substantial change in the roof or in the exterior walls, excepting such repair as may be required by an official governmental agency for the safety of the building."

According to the Board members own personal observation there were *NO* structural alterations. In fact, Mrs. Gertler only painted the building, cleaned it, added new wood in place of old or rotten wood and cemented a portion of the rear yard. Such repairs and improvements do not fall within the definition of structural alterations and have always been welcomed and in keeping with the intent and purposes of the Ordinance. See: *Truly vs. Nielson,* 121 So. 2d 754, 2nd Cir., 1960. Ostensibly, the Board's decision in this respect was neither based on the Zoning Ordinance or the law and was arbitrary and capricious.

Thirdly, the Board of Zoning Adjustments in its decision found that the change of use from a dentist office to a dress shop was impermissable under the Ordinance. Their decision stated:

> "Whereas, this change in use is from a more restrictive use, namely, a dentist office, to a less restrictive use, a commercial dress shop, also contrary to the Zoning Ordinance."

How the Board arrived at that conclusion is not mentioned in their decision — nor is there any reference to a section of the Zoning Ordinance or a citation of

authority. The reason is obvious. A cursory review of Article 5, Section 9.2, Comprehensive Zoning Ordinance shows that dentist offices and retail stores of the character of Mrs. Gertler's are in precisely the same classification. Since the adoption of the amended Comprehensive Zoning Ordinance in 1970 and the removal of "home occupation" uses, dental offices and retail stores using 5000 square feet and less have been treated similarly. The new code provides for General Office Districts exclusive of residential districts in which permitted uses include dental offices and retail stores in the same classification. How could the Board ignore this? It is apparent that the Board was arbitrary and capricious in its finding.

Finally, the Board, without stating a conclusion made an off-hand reference to the property losing its non-conforming status by non-use for more than six months.

> "Whereas, the Board also considered the overwhelming testimony of so many neighbors as to 6301 Louis XIV losing its non-conforming status, since the dentist has been incapacitated for over six months."

The zoning ordinance does provide for a loss of non-conforming use status under certain circumstances. Article 12, Section 2 provides:

> "No building or portion thereof or land used in whole or in part for non-conforming purposes according to the provisions of this ordinance which hereafter becomes and remains vacant for a continuous period of 6 months

> shall again be used except in conformity with the regulations of the district in which such building or land is situated . . ."

The Board had before it the uncontested Affidavit of Dr. and Mrs. Suarez, the previous owners, deposing that Dr. Suarez "did occupy and use the premises bearing Municipal No. 605 Harrison Avenue as a dental office and for commercial purposes." Unexplicably there is no mention of this in the Board's decision. Furthermore, the evidence shows that at all times Dr. Suarez's office was open and his dental sign was obvious in front of his house. Whether the neighbors say that the Doctor was incapacitated is not determinative. Not only was it pure heresay before the Board, but furthermore, as held in *Kinard vs. Carrier*, 175 So. 2d 920 (3rd Cir., 1965),

> ". . . cessation of use does not of itself work abandonment, and unless so provided in zoning ordinance, cessation or discontinuance of non-conforming use without substitution of another use or evidence of intention to abandon will not prevent resumption of non-conforming use."

The decision of the Board in the instant case is void of any finding that there was a substitution of another use — because there wasn't. Also, the only intent expressed by Dr. Suarez was, according to his Affidavit, that he continuously used the property as a dentist office. Again it is apparent that the Board of Zoning Adjustments was arbitrary and capricious in this respect.

This Honorable Court may however properly find that the question of use or non-use is not a real issue in this case. A consideration of the facts clearly show that when Dr. and Mrs. Suarez built an addition to their home in 1959 to include the dental office they were in violation of the Zoning Ordinance. Such violations are prescribed by a period of two years inaction on the part of the City and property owners, forever relieving the property of existing restrictions. In 1959, Dr. Suarez's violations were apparent. At that time the applicable ordinance was the Zoning Law of New Orleans, revised as of May, 1957, 18, 565, C.C.S. It stated in Article 9, Section 2, pertaining to use regulations in the B-Two Family District encompassing 605 Harrison Avenue, that the building may be used for "home occupations" such as dental offices, however, they may not exceed 15% of the floor area and must be exclusive of any accessory building. See: Article 3, Section 26 and Article 3, Section 1, Zoning Law, 18,565 as amended in 1957 for appropriate definitions. The Suarez's dental office was both an accessory building and exceeded 15% of the floor area. Such violations prescribed by two years inaction on the part of the City and neighbors according to Act 455 of 1956 which was the applicable prescriptive statute which states:

> ". . . the particular property involved in the violation of the zoning restriction, building restriction or subdivision regulation, *shall be forever free of the restriction or regulation violated* . . ."

The language is precise and clear. This property is forever free of the commercial use violation and the use or non-use by Dr. Suarez would not affect the

status of this property. As stated in the later amendments by Act 455 by Acts 1962, No. 415 and Acts 1972, No. 54 (R.S. 9:5625)

> ". . . any prescription heretofore accrued by the passage of two years shall not be interrupted, disturbed or lost by operation of the provisions of this section."

It is respectfully submitted that neither the record or the jurisprudence will support the finding of the Board of Zoning Adjustments.

WHEREFORE, your petitioner prays that a Writ of Certiorari issue herein directed to the Board of Zoning Adjustments and/or its members directing it to send up to this court the original or a certified copy of the entire record with respect to the appeal filed by Miles J. Kehoe on September 6, 1974, relative to issuing Building Permit No. 6804 to David Gertler on behalf of Sadie Gertler, for review by this Honorable Court.

/s/ M. H. GERTLER
M. H. GERTLER
ATTORNEY FOR PETITIONER
231 CARONDELET STREET
304 COTTON EXCHANGE
BUILDING
NEW ORLEANS, LOUISIANA
70130
523-5901

/s/ DAVID GERTLER
DAVID GERTLER

ATTORNEY FOR PETITIONER
9TH FLOOR,
BARONNE BUILDING
305 BARONNE STREET
NEW ORLEANS, LOUISIANA
70130
524-1393

VERIFICATION

STATE OF LOUISIANA

PARISH OF ORLEANS

BEFORE ME, the undersigned authority, personally came and appeared M. H. GERTLER, who, after being sworn, duly deposed and said, that he is the attorney for the petitioners herein and that the allegations contained in the above and foregoing Petition are true and correct to the best of his knowledge, information and belief, that he has caused a copy of the said Petition to be served upon all defendants in this matter.

/s/ M. H. GERTLER
M. H. GERTLER

SWORN TO AND SUBSCRIBED
BEFORE ME, THIS 24TH DAY
OF OCTOBER, 1974.

/s/ FRANK UDDO
NOTARY PUBLIC

ORDER

IT IS ORDERED that a Writ of Certiorari issue herein directed to the Board of Zoning Adjustments and/or its members directing it and/or them to send up to this Court the original or a certified copy of the entire record with respect to the Notice of Appeal of Miles J. Kehoe relative to issuing Building Permit No. 6804 to David Gertler on behalf of Sadie Gertler filed on September 6, 1974; the transcript of all hearing conducted pursuant to the appeal; and any and all books, papers, plans or documents of every kind or character relating to the case, on or before the 8 day of November, 1974.

New Orleans, Louisiana, this 28 day of Oct., 1974.

/s/ HENRY J. ROBERTS, JR.
JUDGE

PLEASE SERVE:

CITY OF NEW ORLEANS
THROUGH HON. MAYOR MOON LANDRIEU
CITY HALL
NEW ORLEANS, LOUISIANA

MILES J. KEHOE THROUGH
HIS ATTORNEY OF RECORD
EMILE J. DREUIL
ONE SHELL SQUARE
NEW ORLEANS, LOUISIANA

DEPARTMENT OF SAFETY AND PERMITS
THROUGH EDWARD C. KUNTZ
CITY HALL
NEW ORLEANS, LOUISIANA

BOARD OF ZONING ADJUSTMENTS
THROUGH CALVIN FERRAN
CITY HALL
NEW ORLEANS, LOUISIANA

JUDGMENT

(Number and Title Omitted)

Filed: June 6, 1975

This matter came for trial April 9, 1975, April 10, 1975 and April 22, 1975.

Present: M. H. Gertler, attorney for Sadie Gertler et al
E. J. Dreuil, Jr., attorney for Miles Kehoe
H. W. Kinney, III, attorney for City of New Orleans

After hearing the evidence, testimony and reading the briefs of counsel:

IT IS ORDERED, ADJUDGED AND DECREED that the decision by the Board of Zoning Adjustments adopted at the meeting held September 24, 1974, regarding the herein matter, is hereby annulled, revoked, and set aside, and a Board of Zoning Adjustment's decision to uphold the appeal of Miles J. Kehoe, is hereby reversed.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the resolution which directed the director, Edward C. Kurtz, of the Safety & Permits Department to revoke the "Use and Occupancy Permit Number 6302", is hereby annulled, revoked, and set aside.

JUDGMENT READ, RENDERED AND SIGNED in open Court Jun 6, 1975.

/s/ HENRY J. ROBERTS, JR.
JUDGE

REASONS FOR JUDGMENT

(Number and Title Omitted)

Filed: June 6, 1975

This is a hearing on a petition for Writ of Certiorari and Review.

In the Petition for Review on a statement of the case, it is alleged that in July, 1974, one David Gertler on behalf of Sadie Gertler, his wife, made an application for non-structural repairs on property designated as 605 Harrison Avenue, which also fronts on 6301 Louis XIV Street in the City of New Orleans.

The Department of Safety & Permits issued Building Permit Number 6804, in connection with the said non-structural repairs, and on September 19, 1974,

while the repairs were going on, a Miles J. Kehoe filed an appeal from the decision of the Department of Safety & Permits.

A hearing was held on September 19, 1974, in which the petitioner, David Gertler, and several neighbors appeared and gave various statements as to their position on the property designated as 605 Harrison Avenue. After a hearing on the matter, the Board of Zoning Adjustments upheld the appeal of Miles J. Kehoe against the decision of the Director of Safety & Permits to revoke the Building Permit issued.

The Gertlers applied to this Court for the Writ heard herein. This Court set the return date on the Writ 8 November 1974. A copy of the proceedings on the return of the Writ of Certiorari was filed by the City of New Orleans, through the Department of Safety & Permits.

This Court issued an Order asking for memorandums to be submitted not later than January 6, 1975, in connection with the issues before the Court. After all memorandums had been received, this Court called another pre-trial conference and set the matter for trial to be tried by the Court de novo. This pre-trial was set on January 27, 1975, and the matter was set for trial to begin April 10, 1975.

Prior to the beginning of the hearing, the attorney for Mr. Kehoe and the attorney for the City of New Orleans objected to the Court hearing this matter de novo and took the position that the case should be reviewed solely on the record returned under the Writ of Certiorari. This Court took the position that, under

the statute in question it had the right to hear the matter in its entirety and, therefore, overruled the objection of Mr. Kehoe and the City of New Orleans.

The facts as they developed from the memorandums and pleadings filed and evidence taken, appear to be as follows:

Petitioner Sadie Gertler and her husband, David Gertler, became aware of the property located at 605 Harrison Avenue and 6301 Louis XIV Street as being advertised for sale. Two real-estate agents, evidently, were involved in this transaction, one with the Latter & Blum Agency and a Mr. Zollinger.

The evidence indicates that the Gertlers made contact with the agent Zollinger and made arrangements to view the property in question. It was determined that the property in question belonged to a Dr. and Mrs. Armand Suarez. It is revealed, through the testimony, that several visits were made to the establishment before any transaction was actually consummated. It further shows from the evidence that it was the intent of the Gertlers to open the premises at 604 Harrison Avenue as some kind of boutique, and this is evidenced by the statements in the various agreements to purchase and in the final agreement to purchase the property in question. One of the things that was of concern to the purchasing parties was the nature of the property in question. It is conceded that the property is in Square Number 231, and is zoned by the City of New Orleans as RD-2, two-family residential district.

There is no question that Dr. Suarez, a dentist, had conducted a dental office at the premises 605 Harrison Avenue since approximately the time that he had purchased the property.

Needless to say, the intent of the Gertlers, as it appears to this Court, was that they intended to purchase the property designated as 605 Harrison Avenue and 6301 Louis XIV Street for the main purpose of establishment of a ladies' dress shop. It was of paramount concern to them that the property was duly zoned for that particular purpose. Since the property, however, was zoned RD-2, Dr. Suarez's dental office was in what is called a "non-conforming condition of a zone neighborhood." This means, as this Court understands the law, that at the time that the zoning laws went into effect, Dr. Suarez was conducting an office in the area in question, and, even though it was zoned two-family residential, Dr. Suarez would be allowed to maintain his dental office, even though it was not in conformity with the zoning requirements as initiated by the City.

The facts indicate that there was no problem insofar as the Gertlers were concerned in getting a Building Permit to do certain things in connection with the property. This Building Permit was duly issued, and the testimony is, and the Court is convinced that no structural changes were actually made to the property in question.

The architect for the Gertlers testified, and his plans are in evidence, and it clearly indicates that the property in question was going to measure at least in the area of some seven to nine hundred square feet,

that it encompassed some of the same area that the doctor had used as a dentist office and that no actual structural changes were made, although some walls were actually removed.

The evidence further indicates that from the testimony of Mrs. Suarez, the doctor's wife, that certain areas of the house known as 605 Harrison Avenue or 6301 Louis XIV Street were used at one time or another for the purpose of a dental office. Also brought out is the fact that an alleged apartment owned by the Suarezes was also part of the property encompassed by the Gertlers when they established the boutique shop.

As will appear from the evidence introduced, the property that has been changed on Harrison Avenue does not, in the view of this Court, materially affect an aesthetic (esthetic) view of the neighborhood.

The Court is of the belief that no one contends that the Gertlers have done an unsightly job in connection with their redesign of the area in question. The question seems to boil itself down to a question of law and fact the way the Court reads the matter at this time:

1. Was Dr. Suarez in truth and in fact a dentist practicing at 605 Harrison Avenue at least six months prior to the sale to the Gertlers?

2. Did the Gertlers by its conversion from a dental office to a shop boutique change the use of the property from a more restrictive use to a less restrictive use?

There is no doubt in this Court's mind that Dr. Suarez at the time of trial was, evidently, a very sick man and not able to testify. His wife, however, testified that he had been practicing as a dentist for at least three months prior to the time of the sale, that he had received his license from the State of Louisiana, and, while he may not have performed all the functions that a dentist would expectedly perform, he did do certain work limited to x-rays and other limited matters.

Still on the question of whether or not Dr. Suarez actually practiced the art of dentistry, the defendants offered several witnesses.

A Mr. Reed testified that he knows the Suarezes a great deal of time, but that after the first ten years of knowing them, he may have seen them once a year and "maybe not that much." Under cross-examination he testified that he was a traveling manager of some seventeen stores and had traveled roughly some 40 years and had traveled mostly Tuesdays through Thursdays of every week. The Court finds that he is in no position to actually say whether or not Dr. Suarez did or did not practice dentistry.

In addition to these witnesses, a Mrs. Vince testified, and Mrs. Gomilla testified, along with a Mr. Brian Reynolds. All of these people were in a position to testify that they observed the location of the 605 Harrison Avenue address, but the Court was convinced that none could say for sure as to whether or not Dr. Suarez did, in fact, quit the practice of dentistry.

Another witness by the name of Mr. Toman indicated that he knew the Suarezes for some 25 years

and had visited them in their home a great number of times. It appears by June, 1968, Mr. Toman made arrangements to occupy a portion of the premises, and, while so occupying the premises, he conducted a business. It's the impression of this Court that this business was that of selling magazines, probably a telephone solicitation. Mr. Toman testified that while this was "an apartment," he had no bed in the "apartment," and, in fact, he did not live at this address. He further testified this was an office he occupied. This Court is convinced that Mr. Toman, since 1968, has been carrying on a business at the same location as 605 Harrison, that is the business of selling magazines. Mr. Toman left the premises according to his testimony totally about 1973, and left the premises finally about December, 1973.

This Court, from the evidence, is convinced that Dr. Suarez was practicing dentistry prior to the time that he sold the property to the Gertlers. The Court arrives at this conclusion by listening to the testimony of all the witnesses and, of course, the testimony of Mrs. Suarez. Mrs. Suarez testified that her husband received his dental license to practice every year.

What constitutes the art of practicing dentistry, evidently, is difficult to define. It would seem, however, that Dr. Suarez did enough from the testimony that I have heard to convince me that he was a practicing dentist. He had an office; he had a sign hanging out; according to his wife he did some small amount of x-ray filming and adjustments of plates, et cetera. In addition, she testified that he would refer work to other dentists.

In the case of Blessing vs. Levy, 39 So.2nd 84, Supreme Court of Louisiana, decided February, 1949, while not discussing what practicing dentistry is, Justice Moise, in a concurring opinion, had this to say about the term "practicing law."

> ". . . argument has been made in this Court upon the term used in the Constitution 'practicing law.' What constitutes the 'practice of law'? If this Court knows what every lawman knows, then this Court should have knowledge. There are two types of practicing lawyers: Those who confine their activities to the trial of the cases in the Court; the other is to activities entirely within their offices. The latter may never appear in Court, although they are in the true sense of the word 'practicing lawyers.' . . . all men of a different standard of natural justice. That is why the Constitution provided that this Court be composed of seven members, and it is the belief that a more exact rule of justice can be obtained by the expression of the will of the majority of the members of this Court . . . I believe that his disqualification under the Constitution provision (practicing law) should be made by proof so clearly and so conclusive that there is no doubt of his lack of qualifications . . ."

While, of course, Dr. Suarez is not a lawyer, it would appear to the Court that the same reasoning could be applied to a dentist. It would not seem that the mere fact that a dentist opened an office and never filled a tooth would mean he had not practiced dentistry. He

may have spent most of his time consulting with patients and referrring them to other dentists.

In my view I am of the impression that Dr. Suarez was a practicing dentist at 605 Harrison Avenue at the time or shortly before he sold the property to the Gertlers. In any event he had practiced dentistry at this location at least six months prior to the sale of the property to the Gertlers, and, therefore, it did not lose its non-conformity for that reason.

Another thing of great interest in this case is the fact that the members of the Board of Zoning Adjustments, in their reasons for setting aside the Gertlers' permit, stated they had visited the premises and that the space used exceeded 702 square feet. Under cross-examination Mr. Ferran, the Chairman, testified that at no time when they visited the premises did they actually measure the number of square feet now occupied by the Gertlers. For all we know the amount may not be in excess of the alleged 702 square feet if we rely on the testimony of Mr. Ferran alone.

The most interesting feature of the ruling of the Board is in the paragraph reading as follows:

> "Whereas, this change use (from dental office to dress shop) is from a more restricted use, namely a dentist office, to a less restricted use, a commercial dress shop, also contrary to the Zoning Ordinance."

This Court does not conceive from the evidence that it has heard that a location as we have in this case has changed the area or zoning to a more restrictive use.

This Court was aware of the fact that this was an emotional matter brought on by the neighbors who sincerely believe that the action taken by the Gertlers was in violation of some zoning requirement. The Gertlers, evidently, begin their dress shop in 1974. This matter was not tried before this Court until April, 1975, and, at no time was there any evidence introduced to show that there was increased traffic at 605-607 Harrison Avenue, that any condition had changed insofar as the parking was concerned in this particular area. The Court believes that the neighbors must have been in constant observation to determine whether or not the operation of the Gertler boutique shop was causing any additional traffic or parking problems. Since the matter was not brought out in evidence, the Court must conclude that this problem did not exist. The Board's statement, therefore, that this is a more restrictive use is without merit. Act 455 of 1956 indicates that property involved in a violation of a zoning restriction, building restriction, or zoning subdivision regulation shall be forever free of the restriction or regulation violated. This means to this Court that once a non-conforming use has been made such as in this case that the non-conforming use under the statute does not have to be the same non-conforming use, but of a different type.

To sum up this Court finds that Dr. Armand Suarez conducted a dental office at the Harrison address and that the said dental office, the use thereof, was designated a legal non-conforming use, that at the time the Gertlers purchased the property it maintained the same status.

It is the Court's belief that under the Comprehensive Zoning Ordinance of 1970, Article 12, Section 4, et seq., a non-conforming use of a building may be changed to another non-conforming use. In addition, the Court believes that there were no structural alterations made in violation of any city zoning ordinance.

Therefore, it is the opinion of the Court that the decision by the Board of Zoning Adjustments adopted at the meeting held September 24, regarding the herein matter, is hereby annulled, revoked, and set aside, and a Board of Zoning Adjustment's decision to uphold the appeal of Miles J. Kehoe is hereby reversed.

It is further the opinion of the Court that the resolution which directed the director, Edward C. Kurtz, of the Safety & Permits Department to revoke the "Use and Occupancy Permit Number 6302," is hereby annulled, revoked, and set aside.

* * *

Jun 6 1975

/s/ HENRY J. ROBERTS, JR.

Sadie Gertler, wife of/and David GERTLER

v.

CITY OF NEW ORLEANS et al.

No. 7925.

Court of Appeal of Louisiana, Fourth Circuit.

April 13, 1977.

Rehearing Denied June 7, 1977.

Purchasers of property, which was in two-family residential district and in which dental practice had been conducted as a nonconforming use, petitioned for writ of certiorari and review in regard to city's board of zoning adjustments' revocation of building permit allowing purchasers to alter premises for use as a dress shop. The Civil District Court, Parish of Orleans, No. 581-784, Division "F," Henry J. Roberts, Jr., J., set aside board's decision, and appeal was taken. The Court of Appeal, Fourth Circuit, Beer, J., held that: (1) the action in which person filed an appeal from city's department of safety and permits issuance of the building permit had not prescribed; (2) that Court of Appeal must sustain a board of zoning adjustments' conclusions unless weight of evidence in its entirety so strongly preponderates against them that it compels a finding of an abuse of discretion on part of board and that (3) district court's decision had to be reversed and board's decision had to be reinstated, in that evidence did not warrant conclusion that board acted arbitrarily, capriciously or with any calculated or prejudicial lack of discretion in determining that property had lost its nonconforming status and in determining that use of property as dress shop could not be allowed because cubical content and exterior appearance had been altered.

Reversed and rendered.

1. Zoning ⇐676

Even if district court has original jurisdiction in regard to reviewing decisions of boards of zoning adjustments, court must, generally, accord a rebuttable presumption of regularity to decisions of such boards. LSA-Const.1974, art. 1, § 22; art. 5, § 16; LSA-R.S. 33:4727.

2. Zoning ⇐618, 703

Reviewing court may not merely substitute its own judgment for that of a zoning board or other properly constituted and validly functioning administrative agency; court must first determine or establish whether decision of board or agency is supported by substantial and competent evidence adduced in proceedings which are regular and orderly. LSA-Const.1974, art. 1, § 22; art. 5, § 16; LSA-R.S. 33:4727.

3. Administrative Law and Procedure ⇐791

Administrative Procedure Act provision for reversal of a board type decision whenever it is "[m]anifestly erroneous in view of the reliable, probative, and substantial evidence on the whole record," applies to "state" boards, commissions or departments and not, necessarily, to municipal administrative boards. LSA-R.S. 49:964, subd. G.

4. Zoning ⇐584

Absent any indication that city had knowledge of written notice that use of premises violated any existing zoning ordinance such as to trigger prescriptive statute, action, in which person filed an appeal from city's department of safety and permits' issuance of building permit for nonstructural repairs in regard to alteration of such premises, which was in a two-family residential district and in which dental practice had been conducted as a nonconforming use, for use as a dress shop had not prescribed. LSA-R.S. 9:5625.

5. Zoning ⇐746

Even if Court of Appeal disagrees with a board of zoning adjustments' findings and ascribes no manifest error to findings of district judge who had set aside board's decision, Court of Appeal must sustain board's conclusions unless weight of evidence in its entirety so strongly preponderates against them that it compels a finding of an abuse of discretion on part of board. LSA-Const.1974, art. 1, § 22; art. 5, § 16; LSA-R.S. 33:4727, 49:951 et seq., 49:951(2), 49:964, subd. G.

6. Zoning ⇐749

District court decision, which set aside board of zoning adjustments' revocation of building permit, had to be reversed and board's decision had to be reinstated, in that, though evidence did not indicate that trial judge manifestly erred in his appraisal thereof, it did not warrant conclusion that board acted arbitrarily, capriciously or with any calculated or prejudicial lack of discretion in determining that property had lost its nonconforming status and in determining that use of property as dress shop could not be allowed because cubical content and exterior appearance had been altered. LSA-Const.1974, art. 1, § 22; art. 5, § 16; LSA-R.S. 33:4727, 49:951 et seq., 49:951(2), 49:964, subd. G.

Emile J. Dreuil, Jr., New Orleans, for defendant-appellant.

Chaffe, McCall, Phillips, Toler & Sarpy, Peter Frank Liberto, New Orleans, for defendant-appellant.

Philip Schoen Brooks, City Atty., Henry W. Kinney, III, Jack P. Panno, Asst. City Attys., for defendant-appellant.

Gertler & Gertler, M. H. Gertler, New Orleans, for plaintiffs-appellees.

Before SAMUEL, SCHOTT and BEER, JJ.

BEER, Judge.

The chronological resume contained in the trial court's Reasons for Judgment is accurate. It states:

"This is a hearing on a petition for Writ of Certiorari and Review.

"In the Petition for Review on a statement of the case, it is alleged that in July, 1974, one David Gertler on behalf of Sadie Gertler, his wife, made an application for non-structural repairs on property designated as 605 Harrison Avenue, which also fronts on 6301 Louis XIV Street in the City of New Orleans.

"The Department of Safety & Permits issued Building Permit Number 6804, in connection with the said non-structural repairs, and on September 19, 1974, while the repairs were going on, a Miles J. Kehoe filed an appeal from the decision of the Department of Safety & Permits.

"A hearing was held on September 19, 1974, in which the petitioner, David Gertler, and several neighbors appeared and gave various statements as to their position on the property designated as 605 Harrison Avenue. After a hearing on the matter, the Board of Zoning Adjustments upheld the appeal of Miles J. Kehoe against the decision of the Director of Safety & Permits to revoke the Building Permit issued.

"The Gertlers applied to this Court for the Writ heard herein. This Court set the return date on the Writ 8 November 1974. A copy of the proceedings on the return of the Writ of Certiorari was filed by the City of New Orleans, through the Department of Safety & Permits.

"This Court issued an Order asking for memorandums to be submitted not later than January 6, 1975, in connection with the issues before the Court. After all memorandums had been received, this Court called another pre-trial conference and set the matter for trial to be tried by the Court de novo. This pre-trial was set on January 27, 1975, and the matter was set for trial to begin April 10, 1975."

The trial court also observed:

"Prior to the beginning of the hearing, the attorney for Mr. Kehoe and the attorney for the City of New Orleans objected to the Court hearing this matter de novo and took the position that the case should be reviewed solely on the record returned under the Writ of Certiorari. This Court took the position that, under the statute in question it had the right to hear the matter in its entirety and, therefore, overruled the objection of Mr. Kehoe and the City of New Orleans."

Proceeding on this basis and, thereafter, making factual findings different than those made by the Board of Zoning Adjustments, the trial court concluded:

"To sum up this Court finds that Dr. Armand Suarez conducted a dental office at the Harrison address and that the said dental office, the use thereof, was designated a legal non-conforming use, that at the time the Gertlers purchased the property it maintained the same status.

"It is the Court's belief that under the Comprehensive Zoning Ordinance of 1970, Article 12, Section 4, et seq., a non-conforming use of a building may be changed to another non-conforming use. In addition, the Court believes that there were no structural alterations made in violation of any city zoning ordinance.

"Therefore, it is the opinion of the Courts that the decision by the Board of Zoning Adjustments adopted at the meeting held September 24, regarding the herein matter, is hereby annulled, revoked, and set aside, and a Board of Zoning Adjustment's decision to uphold the appeal of Miles J. Kehoe is hereby reversed.

"It is further the opinion of the Court that the resolution which directed the director, Edward C. Kurtz, of the Safety & Permits Department to revoke the 'Use and Occupancy Permit Number 6302,' is hereby annulled, revoked, and set aside."

The *Louisiana Constitution of 1974* provides in Art. 5, Sec. 16:

". . . (A) *Original Jurisdiction.* Except as otherwise authorized by this constitution, a district court shall have original jurisdiction of all civil and criminal matters. . . .

(B) *Appellate Jurisdiction.* A district court shall have appellate jurisdiction as provided by law."

LSA-R.S. 33:4727 provides for the legislative creation of boards of adjustment, and further provides for a review procedure for those aggrieved by any decision of such boards:

"Any person or persons jointly or severally aggrieved by any decision of the board of adjustment, or any officer, department, board, or bureau of the municipality, may present to the district court of the parish or city in which the property affected is located a petition, duly verified, setting forth that the decision is illegal, in whole or in part, specifying the grounds of the illegality. The petition shall be presented to the court within thirty days after the filing of the decision in the office of the board. Upon the presentation of such petition the court may allow a writ of certiorari directed to the board of adjustment to review the decision of the board of adjustment and shall prescribe therein the time within which a return may be made and served upon the relator's attorney, which shall be not less than ten days but which may be extended by the court. The allowance of the writ shall not stay proceedings upon the decision appealed from but the court may, on application, on notice to the board and on due cause shown, grant a restraining order. The board of adjustment shall not be required to return the original papers acted upon by it, but may return certified or sworn copies thereof or such portions thereof as may be called for by the writ. The return shall concisely set forth such other facts as may be pertinent and material to show the grounds of the decision appealed from and shall be verified. If, upon the hearing, it shall appear to the court that testimony is necessary for the proper disposition of the matter, it may take additional evidence or appoint a referee to take such evidence as it may direct and report the same to the court with his findings of fact and conclusions of law, which shall constitute a part of the proceedings upon which the determination of the court shall be made. The court may reverse or affirm, wholly or in part, or may modify the decision brought up for review. Costs shall not be allowed against the board unless it appears to the court that it acted with gross negligence, or in bad faith, or with malice in making the decision appealed from. All issues in any proceedings under this section shall have preference over all other civil actions and proceedings. Amended by Acts 1968, No. 240, Sec. 1."

The City of New Orleans has enacted a Comprehensive Zoning Law (as amended in 1970) which provides (in Art. 13, Sec. 16, as well as Art. 15, Sec. 2.4, Subsection 5) that:

"Any person or persons, or any officer, department, commission, board, bureau, or any other agency of the City of New Orleans jointly or singularly aggrieved by any decision of the Board of Zoning Adjustments may present to the Civil District Court of the Parish of Orleans, within thirty (30) days after filing of the decision in the office of the Board, a writ of certiorari asking for such relief and under such rules and regulations as are provided for such matters in appropriate legislation of the State of Louisiana."

In *State v. Board of Zoning Adjustments*, 251 La. 691, 206 So.2d 74 (1968), plaintiffs applied for a writ of certiorari to review a decision of the Board of Zoning Adjustments for the City of New Orleans which had granted a variation from the zoning requirements. The Civil District Court for Orleans Parish issued the writ and reversed the decision of the board. On appeal, this court reversed. The Supreme Court granted certiorari, reversed us, and observed:

"(1) The instant law, *supra*, is *sua generis*. It pertains to special matters—zoning—and must be strictly construed. The Board of Zoning Adjustments is an administrative body which renders deci-

sions. There is no provision in either Section 6 of Article XXVII of the Comprehensive Zoning Ordinance, City of New Orleans, or LSA–R.S. 33:4727, providing for a trial de novo of the matters heard before and decided by the Board of Zoning Adjustments. However, both provide for application for certiorari to the district court.

'Certiorari is in the nature of an appellate process; it is a method of obtaining review, as contrasted to a collateral assault. • • •

'• • •

'The function of a writ of certiorari is to correct substantial errors of law committed by a judicial or quasi-judicial tribunal which are not otherwise reviewable by a court. Its purpose is to review the findings and acts of inferior tribunals and officers exercising judicial or quasi-judicial functions, in order to determine whether their jurisdiction has been exceeded, or to ascertain whether the evidence furnishes any legal and substantial basis for the decision of the inferior tribunal.

'• • •' 14 Am.Jur.2d Certiorari, Sec. 2 Nature and office of writ, pp. 778–779.

'Certiorari is an extraordinary writ offering a limited form of review, its principal function being to keep inferior tribunals within their jurisdiction.' 14 C.J.S. Certiorari § 2, p. 122.

'The Supreme Court, the Courts of Appeal, and each of the judges thereof, subject to review by the court of which he is a member, and each district judge throughout the State • • • may also, in aid of their respective jurisdictions, original, appellate, or supervisory, issue writs of • • • certiorari • • • and where any of said writs are refused, the appellate courts shall indicate the reasons therefor.' Art. VII, Sec. 2, La. Const. of 1921.

'Supervisory writs may be applied for and granted in accordance with the constitution and rules of the supreme court and other courts exercising appellate jurisdiction.' Art. 2201, Code of Civil Procedure.

'• • • Primarily, the province of that writ is to "pronounce on the validity of a judicial proceeding." • • • This writ is granted only in case "the suit is to be decided in the last resort, and where there lies no appeal, by means of which proceedings absolutely void might be set aside," • • •' *State ex rel. Wells-Fargo Exp. Co., et al v. Martin, Justice of the Peace*, 48 La.Ann. 1249, 20 So. 729.

(2) It follows that the Civil District Court for the Parish of Orleans acted as a reviewing court in an appellate capacity when it heard the writ of certiorari previously granted by it. Under LSA–R.S. 33:4727, it was permitted to take additional evidence for the proper disposition of the matter. Original jurisdiction was therefore in the Board of Zoning Adjustments and not in the district court."

Then, in *Bowen v. Doyal*, 259 La. 839, 253 So.2d 200 (La.1971), Richard Bowen instituted, by original petition, a suit in the district court of his domicile seeking review of an adverse ruling of the Board of Review of the Division of Employment Security (Louisiana Department of Labor). The district court, on its own motion, dismissed the suit for lack of jurisdiction. The Supreme Court reversed. Citing Art. 1, Sec. 6 of the Louisiana Constitution of 1921 (now Art. 1, Sec. 22 of the Louisiana Constitution of 1974), the Court held that there is a "presumption that all administrative determinations are reviewable by the court . . . (W)e must not only favor but preserve the right of review." The Court went on to distinguish between "judicial review" and "judicial appeal" concluding that when the district courts review the adjudications of administrative bodies, they exercise their original jurisdiction, and courts of appeal and the Supreme Court provide the "only appellate judicial review of administrative matters." [1]

1. Note, however, Art. 5, Sec. 16 of the Louisiana Constitution of 1974 previously quoted in this opinion.

This was followed by *River Oaks-Hyman Pl. H. Civ. A. v. City of New Orleans*, 281 So.2d 293 (La.App. 4th Cir., 1973), in which we interpreted *Bowen v. Doyal* to hold that "when a district court reviews a decision of an administrative body, it is exercising 'exclusive original jurisdiction.'" We further observed that "(c)ertainly the Zoning Board is an Administrative Agency."

Magnum Corp. v. Dauphin, 293 So.2d 582 (La.App. 3rd Cir., 1974) writs den. 295 So.2d 813, followed *River Oaks* and concluded that even though the Louisiana Constitution:

". . . does not specifically grant appellate or supervisory jurisdiction to the district courts to review decisions of administrative boards, such as Boards of Zoning Adjustment • • • In view of the decision in *Bowen v. Doyal* . . . we conclude that district courts have original jurisdiction . . . to review the decisions of Boards of Zoning Adjustment created pursuant to the provisions of LSA–R.S. 33:4721 et seq. The district courts have original jurisdiction to review decisions of those Boards, we think, despite the fact that LSA–R.S. 33:4727 authorizes only a review by the district courts by means of a writ of certiorari • • • The district court may issue a writ of certiorari in aid of its original jurisdiction in that type case."

[1, 2] But, even if the district court has "original jurisdiction," it must, generally, accord a presumption of regularity to the decisions of boards of adjustment. This presumption is rebuttable. However, no reviewing court can, out of hand, simply substitute its own judgment for that of a zoning board or other properly constituted and validly functioning administrative agency. It must first determine or establish whether or not the decision of the board or administrative agency is supported by substantial and competent evidence adduced in proceedings which are regular and orderly. See Anderson, *American Law of Zoning*, Vol. 3, Secs. 21.16 et seq., (hereafter, "Anderson"), and particularly the following:

"While the scope of review in appeals from a board of adjustment is generally a narrow one, limited to a determination of whether the board's decision was arbitrary, unreasonable, or capricious, and whether the record contains substantial evidence in support of the findings of the board, some enabling acts provide for a broader review, including the taking of additional evidence by the reviewing court. The Standard State Zoning Enabling Act provides that if it shall appear to the court that testimony is necessary for the proper disposition of the matter, it may take or appoint a referee to take such evidence as it may direct and report the same to the court with his findings of fact and conclusions of law, which shall constitute a part of the proceedings upon which the determination of the court shall be made. Nearly two-thirds of the states have adopted this language, or some variation of it. These provisions have broadened the scope of review and blurred its dimensions.

"Some courts have construed provisions for the taking of additional testimony as authorizing a trial de novo by the reviewing court. Other courts have viewed the scope of review more narrowly, saying that notwithstanding the provision for the taking of new evidence, 'there is nothing to indicate that the Legislature intended to change the office of the writ (of certiorari) so as to make it operate as an appeal,' and that a trial de novo is not authorized." (Anderson, *supra*, Sec. 21.-19) (Citations omitted.)

In *White v. Louisiana Public Service Commission*, 259 La. 363, 250 So.2d 368 (1971), the Supreme Court, acting on an appeal from a district court which had affirmed orders of the Louisiana Public Service Commission, stated:

"Ordinarily, review of administrative rulings does not even allow the trial court or this court to make independent *findings* of fact where there are findings of fact in the record, unless there is a showing that the findings of fact were arbitrary and unreasonable and made without substantial evidence."

The genesis of this approach is traceable, we believe, to the Administrative Procedure Act (LSA–R.S. 49:951 et seq.). Sec. 964(G) of the Act provides that:

"The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are:

* * * * * *

(5) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or

(6) manifestly erroneous in view of the reliable, probative and substantial evidence on the whole record.

In the application of the rule, where the agency has the opportunity to judge of the credibility of witnesses by first-hand observation of demeanor on the witness stand and the reviewing court does not, due regard shall be given to the agency's determination of credibility issues."

Under Sec. 951(2) of the Act, the word "Agency" is defined as "each *state* board, commission or department which makes rules, regulations or policy . . . pursuant to . . . the constitution or laws of the United States or the constitution and statutes of Louisiana, except the Legislature or any branch, committee or officer thereof and the courts."

Courts, on occasion, have characterized a zoning board as an "administrative agency." See *River Oaks-Hyman Pl. H. Civ. A. v. City of New Orleans, supra.* LSA–R.S. 33:4727 provides that the district court may issue a writ of certiorari directed to the Board of Adjustment to review the decision of the board and provides that the court may reverse or affirm, wholly or in part, or may modify the decision brought up for review. Courts have used the language of the Administrative Procedure Act in the adjudication of matters stemming from a decision of a zoning board. See *Times Picayune Pub. Corp. v. City of New Orleans,* 316 So.2d 147 (La.App. 4th Cir., 1975); *Nassau Realty Co. v. City of New Orleans,* 221 So.2d 327 (La.App. 4th Cir., 1969); *River Oaks-Hyman Pl. H. Civ. A. v. City of New Orleans,* 288 So.2d 420 (La.App. 4th Cir., 1974) writs ref. La., 290 So.2d 909; *McIntosh v. City of New Orleans, Dept. of Regulatory Inspection,* 188 So.2d 183 (La.App. 4th Cir., 1966); and *Reeves v. North Shreve Baptist Church,* 163 So.2d 458 (La.App. 2nd Cir., 1964). Characteristic of this approach is *Nassau Realty Co. v. City of New Orleans,* 221 So.2d 327 (La.App. 4th Cir., 1969), wherein the owner of a lot was denied a permit variation from the requirements of the zoning ordinance and therefore sought a writ of certiorari from the Civil District Court for the Parish of Orleans. The district court (Judge David Gertler) dismissed the suit. On appeal, we affirmed the trial judge's decision and adopted the trial court's reasons for judgment which read, in part, as follows:

"This Court will not substitute its judgment for that of the administrative tribunals in the absence of a showing by plaintiff that the administrative tribunal was arbitrary and capricious, or that it abused its discretion."

[3] Although the Administrative Procedure Act provides a basis for the reversal of a board-type decision whenever it is "[m]anifestly erroneous in view of the reliable, probative, and substantial evidence on the whole record," the Act applies to "state" boards, commissions or departments and not, necessarily, to municipal administrative boards.

Should we continue to analogize the zoning board to "state" boards, and thereby vicariously adopt the quoted language of the Administrative Procedure Act?

If so, then we must consider both records—that of the board and that of the district court—in order to finally determine if the *board* manifestly erred within the definition of the Administrative Procedure Act. To do this, we must address the question of whether or not the Board of Zoning Adjustments was arbitrary and capricious in making the factual determination that Dr. Suarez had ceased practicing as a dentist at the location in question for a period of more than six months prior to the sale,

thereby obviating the new owner's right to make a non-conforming use of the premises.

The following testimony adduced at the board hearing *and* trial significantly relates to this issue:

Mr. David Gertler, a party plaintiff and husband of Sadie Gertler, first visited the property in question during the latter part of December, 1973, at which time the door to the dentist's office was open. (Tr. Vol. IV, p. 111.) At that time, the dentistry equipment was still in the office and the plumbing and electrical facilities were still operational. (Tr. Vol. IV, p. 112.) Mr. Gertler had visited the premises only twice prior to the sale thereof, and at both times, noted Dr. Suarez seated and reading in an area to the rear of the dentist office (marked with an "o" on the Farnet plan, Exh. P–16) (Tr. Vol. IV, pp. 112, et seq., and 123, 137), but acknowledges that he never saw any patients. (Tr. Vol. IV, p. 138.) On cross-examination, Mr. Gertler acknowledged that he had no personal knowledge concerning the use of the premises prior to the December, 1973 visit. (Tr. Vol. IV, p. 177.)

Mr. Gertler was the preparer of the affidavit which the Suarezes had signed and which was admitted into evidence. (Exh. P–7.) This affidavit was subsequently notarized by Mr. Gertler outside the presence of the affiants. (Tr. Vol. IV, p. 122.) Emphasis was placed upon the fact that in May, 1974, the property was classified by Mr. Frank E. Robin, the Chief Building Inspector and Administrator of the Department of Safety and Permits, as a non-conforming use based solely upon the affidavit signed by Mr. and Mrs. Suarez. This allegation was corroborated by Mr. Robin at the trial. (Tr. Vol. I, pp. 94–95.)

Mrs. A. R. Suarez, the wife of Dr. Suarez, testified that from the time the house was built, Dr. Suarez had practiced dentistry there (Tr. Vol. III, p. 249). To that extent, the den area would sometimes be used as a waiting room for patients. (Tr. Vol. III, pp. 261, 275 and 309.)

It was the hope of Dr. and Mrs. Suarez to some day have another dentist occupy the premises (Tr. Vol. III, pp. 272, 285). They fully realized and were continuously aware of the non-conforming use of the premises as a dentist's office (Tr. Vol. III, p. 264).

Dr. Suarez's health began to fail in the early 1970's. Mrs. Suarez testified:

". . . when he went to the doctors in Florida, which was the year my daughter got married, that's four years ago, he was still practicing, he finished practicing that year and finished all his customers, all his patients." ". . . he had to finish his work, he wouldn't let it go." (Tr. Vol. III, p. 282.)

Furthermore, Dr. Suarez was advised that he should not do

". . . tedious work like grinding of the teeth . . . so that therefore he could do X-ray and he could look at a patient and so then when it got to the point that, you know, he was just taking this in to keep the place to be used as a dental office, he didn't want it to be closed because he wanted it to be either rented or he was going to sell it to a dentist, so knowing this, he would take X-rays at times for the family or friends, not really charging them anything, because he was disabled and the Veterans were paying him." (Tr. Vol. III, p. 256.)

Three or four months prior to the sale of the house, Dr. Suarez had ceased even to attend the office at all. (Tr. Vol. III, p. 256.)

Nevertheless, Mrs. Suarez attested that the dental equipment remained in the office and "the office was never closed to patients;" Dr. Suarez still had a license to practice, and the exterior signs advertising his practice continued to be maintained (Tr. Vol. III, pp. 256, 257, 263). Mrs. Suarez testified that the X-ray equipment could have been used until about three months prior to the sale of the house:

". . . he used it off and on at least one or two or three times a month, he'd use it, just maybe taking x-rays or something to keep that as a dental office and this is what he wanted to do. . . ." (Tr. Vol. III, p. 266.)

"The only thing that he would use would be . . . . the x-ray machine." (Tr. Vol. III, p. 267.)

Mrs. Suarez qualified this by testifying ". . . . I wasn't with him all the time, let's be fair about it, I wasn't. I was working. . . . ." (Tr. Vol. III, p. 267.)

Finally, Mrs. Suarez notes:

". . . . he (Dr. Suarez) did most of the work for relatives and close friends, he did not do it because of the fact he was not well, he didn't want to chance on people and charge them and chance that he may hurt them in any way so he just went ahead and did it just to keep the office open." (Tr. Vol. III, p. 305.)

Mrs. Suarez explained that they expected to sell the office to a dentist,

". . . . so therefore we kept that in use and in order to be able to sell it to a dentist, we weren't stupid, I mean my husband, you know, I knew it through someone told me that you got to keep the place open if you want to sell it to a dentist, well, my husband knew it too." (Tr. Vol. III, p. 307.)

Mrs. Suarez essentially admits that Dr. Suarez did X-raying "just . . . . to keep the place open. . . . ." (Tr. Vol. III, p. 308.)[2]

Mr. Philip Zollinger, a real estate broker, obtained a listing agreement with the Suarezes to sell the property in question on October 18, 1973. On that date, he visited the premises and returned on several subsequent occasions. (Tr. Vol. II, pp. 52, 63, 65.) Dr. and Mrs. Suarez were anxious to have a dentist buy the house (Tr. Vol. II, pp. 101, 102). When Mr. Zollinger visited the premises, he observed Dr. Suarez only in the residential portions thereof (Tr. Vol. II, p. 70) and never saw Dr. Suarez working (Tr. Vol. II, pp. 102, 103). To the best of Mr. Zollinger's knowledge, the electricity and water were still running between January 4 and March 13, 1974 (Tr. Vol. II, pp. 71, 75–76).

At the district court hearing, seven neighbors (Otis A. Reed, Steven J. Toman, Mrs. Sybil Vinci, Mrs. Alice Gomila, Mr. Bryan O. Reynolds, Mr. Miles J. Kehoe, and Mr. John M. Coman, Jr.), who lived near the Suarez premises and had been in a position to observe any flow of patients to and from the dentist office, indicated that Dr. Suarez discontinued his practice several years prior to the sale of the property. The majority of these neighbors cited Dr. Suarez's disabling and deteriorating condition as the primary reason for the cessation of his dentistry practice. All of these neighbors testified, with only slight variations, that no persons nor patients were seen to have entered or exited the dentist office during the six-month period in question.

Eight neighbors, including four who later testified at the trial, testified before the Board to the effect that Dr. Suarez had definitely discontinued his dental practice for a period greater than six months prior to the sale to Mrs. Gertler. Reference to the transcript of the proceedings before the Board (which constitutes a part of the record before us) reflects testimony on the part of these witnesses to the effect that Dr. Suarez had not practiced for three to four years prior to the sale because of his illness.[3]

It is uncontested that Dr. Suarez's dental practice (after 1970) constituted a legal non-conforming use of the premises. This would lapse if such practice ceased for a continuous period of six calendar months. (Art. 12, Sec. 2 of the 1970 Ordinance.)

The Board, in its finding of fact, stated:

"Whereas, the Board also considered the overwhelming testimony of so many neighbors as to 6301 Louis XIV losing its non-conforming status, since the dentist has been incapacitated for over six months. . . ."

However, the trial court concluded:

"that Dr. Suarez was a practicing dentist at 605 Harrison Avenue at the time or shortly before he sold the property to the Gertlers. In any event, he had practiced dentistry at this location at least six months prior to the sale of the property to the Gertlers, and, therefore, it did not lose its non-conformity for that reason."

Though this conclusion is not, in our view, manifestly erroneous, we must, also, observe that the record or proceedings before the Board does contain supportive testimony for the Board's finding that Dr. Suarez retained his dental equipment for the calculated purpose of simply maintaining the appearance of a dental office (thereby preserving its non-conforming status on a non-acceptable basis).

Though the records, when considered together, can support a conclusion that the equipment remained on the premises and the dental office remained "open" and that use was made of the X-ray equipment on limited occasions and signs on the front lawn and glass window were left in place; those records also can support a conclusion that few, if any, patients entered the premises after 1970; that none were actively treated for at least six months prior to the sale; that Dr. Suarez had himself delisted as a dentist from the yellow pages of the phone book in 1972; that by January, 1972, the house and dental equipment had been put up for sale (Tr. Vol. I, pp. 33, 34); that the income tax returns for 1973 fail to report any income from the practice of dentistry (Exh. Kehoe–11); that Dr. Suarez received Veterans Benefits for being totally disabled after 1972; and, finally, that Mr. Toman, who rented the apartment on the premises, never saw any patients nor heard any sounds resembling a dental drill.

Mr. Toman leased a portion of the property and allegedly sold magazine subscriptions by telephone from there. But this activity was proscribed by the then existing 1953 Ordinance. Note the distinction in *State Ex Rel. Time Saver Stores v. Board of Zon. Adj.*, 261 So.2d 273 (La.App. 4th Cir., 1972) writs ref. 262 La. 311, 263 So.2d 47, where the building was used in whole for *separate* non-conforming uses. Here, Toman's use was violative of the 1953 Ordinance and not a legal non-conforming use.

[4] The record lacks any relevant evidence indicating that the governing municipality had knowledge or written notice that the use of the premises violated any existing zoning ordinance such as to trigger the applicable prescriptive statute (Act 455 of 1956 as amended by Act 415 in 1962 as further amended by Act 54 of 1972 as presently found in LSA–R.S. 9:5625). The action initiated by Miles Kehoe had not prescribed. See *Parish of Jefferson v. Bertucci Brothers Construction Company*, 176 So.2d 688 (La.App. 4th Cir., 1965) writs ref. 248 La. 416, 179 So.2d 16; *Parish of Jefferson v. Groetsch*, 256 So.2d 722 (La.App. 4th Cir., 1972) writs ref. 260 La. 1204, 258 So.2d 552.

Addressing appellants' claim that the property had been structurally altered by Mrs. Gertler, we note that Art. 12, Sec. 4 of the 1970 Ordinance provides:

"If no structural alterations are made, a non-conforming use of a building may be changed to another non-conforming use . . . ."

And Art. 14, Sec. 105 defines "Structural Alterations" as follows:

"Structural alterations. Any changes in the supporting members of a building, such as footings, bearing walls or partitions, columns, beams, or girders, or any substantial change in the roof or exterior walls, excepting such repair as may be required by an official governmental agency for the safety of the building."

The Board found:

"Whereas, it was noted that application for Use and Occupancy Permit on file in Safety and Permits Office states office space to be used will not exceed 702 sq. ft. This would be the space occupied by previous owner for dentist office. The members saw that the actual space to be used for dress shop exceeds this 702 sq. ft., incorporating a former apartment. Therefore, the cubical content is being

2. Mrs. Suarez did not testify at the Board hearing. Her first and only appearance as a witness was at the trial.

3. See Board transcript: Emile Dreiul, pp. 3, 5; Miles Kehoe, p. 6; Sybil Vinci, p. 7; Otis A. Reed, pp. 7–8, 12; Joseph S. Casey, p. 8; Harold Lee, p. 9; John Kohlman, p. 9; Bryan O. Reynolds, p. 22 and his letter to Board dated September 16, 1974.

added to. The exterior, it is felt by the members has been altered enough to change the appearance of the area and does in their opinion adversely effect the neighborhood. By paving a former rear yard area in this RD–2 Two Family Residential District the Board feels a commercial appearance will replace a residential look. They are of the opinion that it would not be in keeping with the intent and purpose of the Ordinance to allow this business as cubical content and exterior appearance have been altered in this non-conforming building. . . . ."

However, the district court concluded:

". . . the Court is convinced that no structural changes were actually made to the property in question."

The district court further opined that the changes effected by Mrs. Gertler have not materially affected an aesthetic view of the neighborhood nor have they done an unsightly job in connection with their redesign of the area in question.

Appellants allege three instances of "substantial structural alterations:"

1. The amount of glass paneling in the exterior wall doubled, substantially changing an exterior wall and constituting a change in a bearing wall.
2. An original brick wall inside the area had two door openings, each widened to 7 foot openings, constituting a change in a bearing wall.
3. The removal of the remaining interior partitions, the paving of the backyard, the altering of the page fence, and the construction of partitions in the family room (Area Y, P–16, Page B) when taken together constitute a substantial structural alteration.

Responding, appellees rely upon the testimonies of Messrs. Edward Goins (the general contractor for Mrs. Gertler) and Stewart Farnet (the architect for Mrs. Gertler) which reflect that no structural changes were made. Although changes were made in the walls; partitions were constructed for dressing rooms; the partitions separating the former dentist office from the apartment were removed; the roof was repaired; and doors widened, these alterations did not change the "supporting members" of the building and were, at most, a resectioning of the existing interior space or cosmetic improvements to the exterior.

We take note that the district court also dealt with the Board's finding that the space used by Mrs. Gertler for the dress shop exceeded that allowed by the Use and Occupancy Permit (i.e. 702 square feet). Specifically, the trial judge emphasized Mr. Ferran's (the Board Chairman) testimony concluding "that at no time when they (the Board) visited the premises did they actually measure the square feet now occupied by the Gertlers." Mr. Ferran testified that he "stepped off" the distances in addition to studying the carpenters' plans. The testimony of Mr. Gertler (Vol. IV, p. 151) (also p. 144) shows that a former den or family room, used by the Suarez family, and not used as a dentist office or by Mr. Toman for commercial purposes, was used by the boutique as dressing rooms and display area.

CONCLUSION

The 1970 Ordinance (Art. 12, Sec. 2) reads in part:

"Neither the intention of the owner nor that of anybody else to use a building or lot or part of either for any nonconforming use, nor the fact that said building or lot or part of either may have been used by a makeshift or pretended nonconforming use shall be taken into consideration in interpreting and construing the word 'vacant' as used in this section."

Thus, if the Board had a proper evidentiary basis for concluding that the activities of Dr. Suarez were "makeshift or pretended," then the Board's final decision cannot be said to be impugned with caprice or arbitrariness. Generally, see *In Re Coleman*, 242 So.2d 602 (La.App. 4th Cir., 1970); *Fuller v. City of New Orleans*, 311 So.2d 466 (La.App. 4th Cir., 1975).

The Board, at a duly noticed and regularly conducted hearing, publicly received testimony from numerous persons on both sides. Then, ". . . the Board members felt that an on the scene inspection was necessary to see for themselves and fully understand the case. After said inspection the members discussed scene and reviewed file. . . . ."

Again, we note that if, on the basis of this inspection, the Board made factual findings which have support in the record, such findings cannot be said to be capricious or arbitrary.

[5] Although, on one hand, we might disagree with the Board's findings and, on the other hand, ascribe no manifest error to those findings of the district judge, we are obliged to sustain the Board's conclusions unless the weight of the evidence in its entirety so strongly preponderates against such conclusions that it compels us to find an abuse of discretion on the part of the Board.

[6] Even though the evidence adduced at the trial of this matter before the district court cannot be said to form a basis for a finding that the trial judge manifestly erred in his appraisal thereof, we, likewise, can not conclude that the Board acted arbitrarily, capriciously or with any calculated or prejudicial lack of discretion. For this reason, we must reverse the decision of the district court and reinstate the decision of the Board.

Accordingly, it is ordered that the judgment of the Civil District Court for the Parish of Orleans, read, rendered and signed on June 6, 1975, be and the same is hereby annulled, revoked and set aside, and it is further ordered that the resolution adopted by the Board of Zoning Adjustments at a meeting held September 24, 1974, Re: Docket 182–74—6301 Louis XIV St., RD–2 Two Family Residential District, be and the same is hereby reinstated.

REVERSED AND RENDERED.

ON APPLICATION FOR REHEARING

Before SAMUEL, SCHOTT and BEER, JJ.

PER CURIAM.

It is more likely than not that legal proceedings in a court of record will provide due process safeguards not necessarily available (or as vigorously enforced) in municipal zoning board proceedings.

Were we to perceive that the measure of our judicial deliberation was the weighing of the relative due process merits of those two proceedings, we would affirm the judgment of the Civil District Court.

However, in its twelve-page written reasons for judgment, the Civil District Court for the Parish of Orleans makes no reference whatsoever to any instance where the Board of Zoning Adjustments has limited or impinged upon the due process rights of applicants for rehearing. The Civil District Court for the Parish of Orleans determined that the evidence adduced in the proceedings before that court was more supportive of applicants' factual contentions. Had the Civil District Court for the Parish of Orleans made factual findings, supported by the record, that applicants' due process rights were materially or substantially impinged, such conclusions might have supported that court's ultimate finding that the Board's actions were arbitrary and capricious. Such was not the case.

The application for rehearing must be denied.

REHEARING REFUSED

SUPREME COURT OF LOUISIANA
New Orleans, 70112

SADIE GERTLER, WIFE OF/AND DAVID GERTLER

versus NO. 60,169

CITY OF NEW ORLEANS, DEPT. OF SAFETY AND PERMITS OF THE CITY OF NEW ORLEANS, BOARD OF ZONING ADJUSTMENTS AND MILES J. KEHOE

In re: Sadie Gertler, wife of/and David Gertler applying for certiorari, or writ of review, to the Court of Appeal, Fourth Circuit, Parish of Orleans

Writ denied. Result is correct.

/s/ JLD
/s/ JWS
/s/ AT JR
/s/ JAD
/s/ PFC
/s/ WFM

A TRUE COPY
Clerk's Office
Supreme Court of Louisiana
New Orleans
September 23, 1977

/s/Harold A. Moise, Jr.
Clerk

NOTICE OF INTENTION TO APPLY FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

Court of Appeal — Fourth Circuit
State of Louisiana

SADIE GERTLER, WIFE OF/AND DAVID GERTLER

versus NO. 7925

CITY OF NEW ORLEANS, DEPARTMENT OF SAFETY AND PERMITS OF THE CITY OF NEW ORLEANS, BOARD OF ZONING ADJUSTMENTS AND MILES J. KEHOE

Sadie Gertler, wife of/and David Gertler, plaintiffs in the above entitled and numbered cause respectfully give notice of their intention to apply for a writ of certiorari to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Louisiana denying supervisory writs, entered in this cause on September 23, 1977.

This application shall be taken pursuant to 28 USC § 1257(3).

GERTLER AND GERTLER

/s/ M. H. GERTLER
M. H. GERTLER
225 Baronne Building
Suite 912
New Orleans, Louisiana 70112
Telephone: 581-6411

CERTIFICATE

I hereby certify that three copies of the above and foregoing has been furnished to all opposing counsel of record on this ____ day of December, 1977.

_____

JOEL P. LOEFFELHOLZ